

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ANNETTE HARTLEY
Claimant

VS.

RECREATIONAL VEHICLE PRODUCTS
Respondent

AND

FIREMAN'S FUND INSURANCE COMPANY
Insurance Carrier

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Docket No. 217,596

ORDER

Claimant Prochaska, Scott & Craig (hereinafter P&S) appeals the attorney fees Order of Administrative Law Judge John D. Clark dated February 22, 2000. In that Order, Attorney Joni J. Franklin (hereinafter Franklin) of the firm of Render Kamas, L.C. (hereinafter RK) was awarded the entire attorney fees portion of a settlement entered into between the above claimant, Hartley, and the respondent, Recreational Vehicle Products. Oral argument was held on August 11, 2000.

APPEARANCES

Claimant and respondent appeared not, having resolved their disputes in this matter. Respondent paid all funds due and owing either for the benefit of claimant or into trust pending the resolution of this dispute. P&S appeared by their attorney, Timothy A. Emerson, of Wichita, Kansas. Joni J. Franklin from Wichita, Kansas, appeared for herself and for the Wichita firm of RK.

RECORD AND STIPULATIONS

The record in this matter consists of the motion hearing, held before Administrative Law Judge John D. Clark on February 22, 2000, with attachments.

By way of stipulations, the parties agree that contained in the trust account of RK is \$162.35 representing expenses incurred by P&S during the litigation of claimant's case. There is no dispute as to this amount, and these funds will be paid upon the resolution of

this litigation. Additionally, it is stipulated claimant was paid 114.43 weeks temporary total disability compensation at the rate of \$276.36 per week totaling \$31,623.87. Of this amount, it is stipulated that \$7,905.97, or 25 percent, was paid to P&S under their contract with claimant Hartley.

The dispute between claimant and respondent was resolved as to all issues by way of settlement hearing on December 16, 1999. The settlement included a lump sum payment of \$13,500. Of that amount, \$3,233.54 was designated as fees representing 25 percent of the remaining total after expenses of \$565.83 were deducted. \$403.48 is stipulated as expenses owed to RK; \$162.35 is stipulated as expenses owed to P&S.

ISSUES

This dispute centers around the entitlement of P&S, Franklin and RK to fees in the amount of \$7,905.97, or 25 percent of the temporary total disability compensation paid, and fees of \$3,233.54, or 25 percent of the settlement sum paid after expenses were deducted. The division of those fees between the two law firms, P&S and RK, and Franklin constitute the only issues before the Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The title to this case is confusing in that the only parties who are affected by this decision are law firms P&S and RK, and Franklin who currently works for RK. A discussion of the history of this litigation is necessary in order to understand the decision rendered.

Claimant Annette Hartley suffered accidental injury while working for Recreational Vehicle Products (hereinafter RV Products) on August 29, 1996. Franklin, at that time working for P&S, was retained to represent Ms. Hartley in her litigation against RV Products. Preliminary hearings were scheduled and held and, as a result, claimant Hartley was provided medical treatment and collected temporary total disability compensation for 114.43 weeks. This temporary total disability compensation was paid from February 18, 1997, through March 9, 1999. It is undisputed that the temporary total disability compensation was awarded based upon the litigation activities of Franklin during her employment at P&S.

However, in December 1997, Franklin left the firm of P&S, transferring her litigation skills to the firm of RK. As a result of that employment change, a conflict arose between Franklin and P&S. That dispute over fees resulted in a February 11, 1999, handwritten document titled "Release and Agreement". This document, authored and written by Mr. Prochaska, divided cases between Franklin and P&S. The parties agreed to a split of 45 percent of fees to P&S and 55 percent of fees to Franklin, both individually and on behalf of RK, pertaining to all cases settled and/or to be settled and litigated in which any

recovery is made. The document referred to a master list of cases originally prepared by Franklin on January 7, 1998, dividing the cases between P&S and RK. Claimant Annette Hartley was originally listed with P&S under the workers' compensation section. It is noted this list covered not only workers' compensation cases of P&S and RK, but also personal injury and medical malpractice cases as well.

P&S continued to represent Ms. Hartley in her workers' compensation litigation against RV Products until June 1999. At that time, Ms. Hartley terminated her contract with P&S. She then retained Franklin, now with RK, to litigate her workers' compensation claim against RV Products.

In a prepared affidavit, Ms. Hartley alleged that P&S failed to obtain a settlement offer, failed to arrange, schedule or obtain appropriate impairment ratings, failed to communicate with her regarding her case and refused to return telephone calls.

The record is scant regarding what activities were undertaken by P&S between the December 1997 departure by Franklin and the June 1999 termination of the attorney/client relationship. There was, however, a pre-hearing settlement conference scheduled in May 1999 between claimant, then represented by P&S, and respondent RV Products. However, there was no settlement offer or agreement reached on claimant's behalf at that time.

Claimant had earlier been referred by P&S to James L. Gluck, M.D., who assessed claimant a 12 percent functional impairment to one shoulder. That limited impairment rating appears, in some part, to have influenced claimant's decision to terminate the contract with P&S. Claimant's symptoms included bilateral upper extremity complaints, triggering in the left hand, and symptoms in her shoulder and neck. There is no evidence of additional litigation activities by P&S on behalf of claimant contained in the record.

Franklin began representing claimant Hartley again in June 1999. Claimant was referred for additional treatment, unauthorized medical allowances were paid, unpaid past medical bills were brought current, and claimant was reimbursed a substantial amount for mileage which was due and owing. The matter between claimant and RV Products was then settled based upon a lump sum settlement of \$13,500. That settlement included impairments for claimant's alleged injuries to her bilateral upper extremities, shoulder and neck. Thereafter, the monies were divided between claimant and the attorneys. Only the dispute involving attorney fees remains unresolved.

After their contract with claimant was terminated, P&S did, in June 1999, file a lien with the Workers Compensation Director, requesting 25 percent of all recoveries obtained in this litigation. However, both in their brief to the Board and at the time of oral argument before the Board, P&S advised both the Board and Franklin that their claim in this matter included only the \$162.35 in expenses which is not in dispute and 25 percent of the "fees"

rendered from the settlement. Therefore, P&S's claim consists of \$162.35 in expenses and \$808.39 representing 25 percent of the \$3,233.54 fee paid from the settlement, all totaling \$970.74.

Franklin and RK contend that P&S should incur no additional fees in this matter. Conversely, they argue that they are entitled to a portion of the fees collected by P&S from the earlier paid temporary total disability compensation. It is acknowledged that the temporary total disability compensation was paid as a result of the litigation efforts of Franklin while working as an attorney for P&S. Substantial temporary total disability compensation was, however, paid after December 1997, when Franklin left P&S, with temporary total disability compensation continuing through March 9, 1999. Franklin and RK contend that the contract arrangement between P&S and Franklin covers all funds paid after Franklin left P&S in December 1997. That would include the approximately 15 months of temporary total disability benefits paid to claimant after Franklin's departure from P&S. Franklin argues that the 55 percent split of fees guaranteed to her should include all temporary total disability compensation paid after her December 1997 departure from P&S.

In workers' compensation litigation, the Director of Workers Compensation is empowered to review attorney claims for services rendered. The reasonableness of an attorney fees claim is decided by the Director, pursuant to K.S.A. 44-536(b), after considering the following:

- (1) The written offers of settlement received by the employee prior to execution of a written contract between the employee and the attorney; the employer shall attach to the settlement worksheet copies of any written offers of settlement which were sent to the employee before the employer was aware that the employee had hired an attorney.
- (2) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal services properly;
- (3) the likelihood, if apparent to the employee or the employee's dependents, that the acceptance of the particular case will preclude other employment by the attorney;
- (4) the fee customarily charged in the locality for similar legal services;
- (5) the amount of compensation involved and the results obtained;

- (6) the time limitations imposed by the employee, by the employee's dependents or by the circumstances;
- (7) the nature and length of the professional relationship with the employee or the employee's dependents; and
- (8) the experience, reputation and ability of the attorney or attorneys performing the services.

However, when a dispute arises regarding attorney fees, K.S.A. 44-536(h) states:

- (h) Any and all disputes regarding attorney fees, whether such disputes relate to which of one or more attorneys represents the claimant or claimants or is entitled to the attorney fees, or a division of attorney fees where the claimant or claimants are or have been represented by more than one attorney, or any other disputes concerning attorney fees or contracts for attorney fees, shall be heard and determined by the administrative law judge, after reasonable notice to all interested parties and attorneys.

Here, the dispute regarding attorney fees was determined by Administrative Law Judge John D. Clark. In reaching his decision, it is apparent that the Administrative Law Judge considered at least some of the elements contained in K.S.A. 44-536(b), 1 through 8. However, the time and labor expended in this litigation cannot be verified from the record. The Administrative Law Judge, therefore, decided the distribution based upon quantum meruit. The use of quantum meruit to determine a dispute among attorneys in workers' compensation litigation has long been accepted in Kansas. The Kansas Court of Appeals, in Madison v. Goodyear Tire & Rubber Co., 8 Kan. App. 2d 575, 663 P.2d 663 (1983), was asked to consider just such a dispute. In Madison, attorney Frank Taff represented a claimant in a workers' compensation case for a short period of time. Claimant then terminated the contract with Mr. Taff, hiring Reginald LaBunker to represent him in the claim. Mr. Taff filed a lien against the workers' compensation claim, asserting his entitlement to 25 percent of any settlement or award that claimant might ultimately obtain. Mr. Taff could only verify 5 hours of actual time spent consulting with claimant and researching the case.

Mr. LaBunker successfully represented claimant in the claim, ultimately obtaining a substantial award. Mr. Taff then asserted his claim for the 25 percent of the total award, and the matter went to hearing before the administrative law judge assigned to the case. Attorney Taff was awarded \$400 in attorney fees representing 8 hours of work at \$50 per hour for his labors. The balance of the 25 percent fee was awarded to attorney LaBunker. That decision was affirmed by the Director and the District Court.

The Kansas Court of Appeals was asked to consider whether attorney Taff's argument that he was entitled to the full contingency fee under the contract was supported by Kansas case law. The Court of Appeals found the logic of attorney Taff to be unsupported and further that it was not mandated by legal precedent. The Court of Appeals went on to hold that an attorney, who is discharged before the occurrence of a contingency provided for in a contingency fee contract, may not, generally, recover his compensation on the basis of a contract, but may recover, in quantum meruit, the reasonable value of the services which he has rendered. Id. at 579.

In Madison, the Court had some evidence regarding how much time was actually spent in litigation by attorney Taff. In this instance, the record is slight regarding the amount of time expended by P&S after the departure of attorney Franklin from their offices. There is evidence in the record that firm P&S expended some time and energy in pursuing this matter for claimant Annette Hartley. Those efforts were, however, unsuccessful in producing a settlement, resulting in the discharge of P&S as claimant's attorney. As some time and effort was expended, some remuneration should be rendered to P&S for their efforts.

However, the more successful litigation was spearheaded by Franklin, both initially when she was with P&S and later while with RK.

In particular, after claimant terminated the contract with P&S and rehired Franklin while at RK, Franklin successfully obtained necessary medical benefits for claimant and ultimately negotiated a substantial settlement on claimant's behalf. The amount of time expended by Franklin was also not set out in the record. Therefore, the Board is left to speculate as to how much time each firm expended on claimant's behalf.

P&S originally argued an appropriate computation of the quantum meruit of the two firms in this matter would be to consider the amount of time each represented claimant. P&S represented claimant for 31 months, while RK only represented claimant for six months. This would result in P&S being awarded 84 percent of the fees, while RK would be limited to only 16 percent. That result seems unfair. The successful litigation of this matter by Franklin would entitle her and RK to substantially more than 16 percent of the fees.

P&S limited itself to 25 percent of the settlement fees awarded, rather than 25 percent of the total award. Therefore, the maximum that they claim is \$808.39, plus their designated expenses. This would leave \$2,425.15, plus expenses, for Franklin. The Appeals Board finds, in applying the logic of the Kansas Court of Appeals in Madison, that a reasonable value of the services provided by each would entitle P&S to 25 percent of the fees, or \$808.39, and Franklin and RK would be entitled to 75 percent of the fees, or \$2,425.15, plus their designated expenses. Therefore, the Appeals Board modifies the

Order of Administrative Law Judge Clark and grants the parties attorney fees as above designated.

Argument was presented that the fee arrangement should be decided based upon the "Release and Agreement" contract entered into between Franklin, on behalf of herself and RK, and attorney Bradley J. Prochaska, on behalf of himself, Gerard C. Scott and P&S. However, that contract specifically refers to the division of cases set out in the January 7, 1998, list prepared by Franklin. In that list, claimant Annette Hartley was designated as a client of P&S. However, after the list and contract were created, claimant Hartley elected to terminate her services with P&S and rehire Franklin at RK. The Appeals Board has no jurisdiction to determine the terms of that contract as it applies to that discontinued legal relationship. That contract dispute is better left for district court.

Additionally, Franklin requested in her brief that the Board consider the attorney fees portion of the temporary total disability compensation paid to claimant during the litigation of this matter. That 25 percent portion, which totals \$7,905.97, was paid entirely to P&S during the litigation of the claim. However, Franklin argues that the temporary total disability compensation was obtained as a result of her labors while at P&S and that P&S obtained a substantial benefit from her work. She then argues a quantum meruit result would entitle Franklin to at least a portion of the fees generated from the temporary total disability compensation paid. The Appeals Board disagrees. Quantum meruit does not apply to the percent of temporary total disability because the contingency occurred at the time the temporary total disability was ordered. Therefore, the fees from the temporary total disability were properly paid to P&S. To the extent the "Release and Agreement" may have altered this result is nonjurisdictional. The Appeals Board will not interpret the "Release and Agreement" contract entered into between the parties, which incorporates not only workers' compensation cases, but also personal injury and medical malpractice litigation cases both with the P&S and RK firms. That contract dispute is more appropriately litigated in district court.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge John D. Clark dated February 22, 2000, should be, and is hereby, modified to award attorney fees in the amount of \$2,425.15, representing 75 percent of the total attorney fees award from the settlement, to Franklin and Render Kamas, L.C., and additionally awards Franklin and Render Kamas, L.C., expenses in the amount of \$403.48. In addition, the Board awards to the firm of Prochaska, Scott & Craig fees in the amount of \$808.39, representing 25 percent of the total settlement fees rendered in this matter and, in addition, expenses in the amount of \$162.35. Franklin is

denied a percentage of the fees generated from the payment of temporary total disability compensation to claimant. The costs of the transcript of hearing is assessed against the firm of Render Kamas, L.C., and Joni J. Franklin.

IT IS SO ORDERED.

Dated this ____ day of November 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Joni J. Franklin, Wichita, KS
Timothy A. Emerson, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director